



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Application of Union Pacific Railroad
Company, Keene Water System
(0434W), for Authorization to Increase
Rates and for Interim Rate Relief

Application 04-11-004
(Filed November 4, 2004)

OPENING COMMENTS OF THE WATER DIVISION

I. INTRODUCTION

Pursuant to Rules 77.2 and 77.3 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, and Administrative Law Judge (ALJ) John Thorson's July 3, 2006 email granting leave to file comments on July 5, 2006, the Water Division (WD) hereby submits these Opening Comments on the Proposed Decision (PD) of ALJ John Thorson.

Although the PD correctly finds that the Commission has jurisdiction to review the reasonableness of Union Pacific/Keene Water System's (UP/KWS) 1994 pipeline removal, it unfortunately finds that UP/KWS acted reasonably in removing the pipeline. While the WD strongly disagrees, the WD considers this to be a matter of judgment not legal or factual error.

The WD applauds the PD's finding that the selection of an alternative water supply to the 1994 pipeline removal was done without prudence. The WD does not see any error with the PD's conclusions regarding metering and billing. On the issue of water quality, the WD supports the PD's efforts to ensure safe and reliable water for the ratepayers. Lastly, the WD supports the PD's self-imposed stay to facilitate negotiations

among the parties. The WD will play a constructive role in such negotiations and pledges to use its good offices towards obtaining of a mutually beneficial resolution.

The WD's does find legal and factual error with the PD's inclusion of the 1997 distribution pipeline into ratebase, and the following comments focus on that issue.

II. THE 1997 PIPELINE EXPENSES ARE INCORRECTLY INCLUDED IN RATEBASE.

The WD has proven that the 1997 pipeline work was done for the benefit of the railroad and not the ratepayers. (See WD Opening Brief (OB) pp., 12-17.) It has also proven that the pipeline work could not properly be ratebased because it was already expensed. (See *id.* at 11-12.) Lastly, the WD demonstrated that UP/KWS was imprudent in not having a main replacement program, and that if it had such a program UP/KWS's current pipeline replacement costs would be lower than what it requested. (See *id.* at 14.)

The PD reached a different conclusion regarding who benefited from the pipeline work. While the WD strongly disagrees, this is a matter of judgment not legal or factual error. The PD also disagreed with the WD regarding UP/KWS's ability to ratebase items that have already been expensed. However, the PD fails to address the second step of the WD's argument – not only does ratebasing items that have been previously expensed lead to an unjust utility windfall it is also *retroactive ratemaking* and runs afoul of the legal requirement of forward looking ratemaking. (See *id.* at 14, WD OB, p.12.)

The PD acknowledges that the pipeline replacement occurred in 1997, and yet allows rate recovery to occur in the 2004 test year. (See PD, Finding of Fact 9, 11.) Permitting this form of retroactive ratemaking is legal error. Such action violates Public Utilities Code §728 and the Commission's long standing policy against retroactive ratemaking. (See PU Code §728; See also, e.g., D.05-06-011, *12-19; and D.03-05-076, *9, fn. 5.)

The ratebase at issue is properly categorized as "general ratemaking" and is not an issue of policy, memorandum accounts, or other exceptions to the long standing rule against retroactive ratemaking. (See generally, *SCE v. CPUC*, (1978) 20 Cal.3d 813.)

Forward looking ratemaking is a legal requirement of this Commission. The PD fails to follow, or distinguish, this long-standing requirement. As such, the PD committed legal error. This error should be corrected by disallowing the costs of the 1997 pipeline work.

The WD has shown that, assuming *arugendo*, that the pipeline costs should be ratebased, that the amount to be ratebased is less than the requested amount. This is because UP/KWS should have had a main replacement program in place instead of waiting until the whole of the pipeline need to be replaced at once. (See WD OB, p. 14.)

III. DEFERRED MAINTENANCE IS IMPURDENT BEHAVIOR

The PD also is mistaken in its finding that there is insufficient evidence that Keene's failure to perform ongoing maintenance on the distribution pipeline was imprudent. As the PD acknowledges, there is ample evidence that the pipeline was in poor condition. (See PD, p.12.) Failure to engage in any main replacement program for a hundred years is so obviously imprudent it is akin to a *res ipsa loquitur* situation.¹ The fact that UP/KWS allowed a pipeline to degraded un-maintained, decade after decade, for a century thereby causing harm to ratepayers in the form of poor water quality and rateshock-inducing ratemaking-requests is in and of itself sufficient evidence of the imprudent nature of UP/KWS's actions.

If UP/KWS had a main replacement program, as a prudent utility would, its current request would have been a fraction of what it is now seeking. (See WD OB, p.14.) The PD claims that there is insufficient evidence to show what that difference in requests would be. (See PD, p.15.) It is true that a specific number was not put forth, but is equally true that the would-be number would certainly be less than what UP/KWS is

¹ Res ipsa loquitur (the thing speaks for itself) is a doctrine that is used in negligence claims, which do not have to be explained beyond the obvious facts. It is applied when 1) the harm (e.g., an excessive ratebase request to replace neglected pipelines) would not have ordinarily occurred without someone's negligence, 2) the instrument of the harm was under the exclusive control of the defendant (e.g., UP/KWS), and 3) the plaintiff (e.g., ratepayers) did not contribute to the harm. (See generally, *Byrne v. Boadle*, 159 Eng. Rep 299 (1863).)

currently seeking. As such, awarding UP/KWS its full request is clearly an error as it is unsupportable by the evidence. A reasonable and supportable figure would have to be less than what UP/KWS is currently seeking.

IV. CONCLUSION

For the foregoing reasons the PD should be corrected to remove the 1997 distribution pipeline replacement costs from the requested ratebase.

Respectfully submitted,

/s/ J. JASON REIGER

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July 5, 2006

APPENDIX

Proposed Findings of Fact:

The below modifications to the Findings of Fact are necessary to decide the ratemaking effects of this Application.

Number 10 should be modified as follows:

The 1997 distribution pipeline replacement project was *not* a reasonable and prudent decision. *The Keene Water System should have had a main replacement program in place that would have replaced the pipeline in sections over a period of time, thus maintaining pipeline quality and avoiding rate shock. The benefits to the railroad are outweighed by the benefits to the water users of an updated water distribution system, and the protestants have offered no evidence quantifying how any benefits to the railroad could be qualified. Furthermore, any attempt to ratebase the past costs of the 1997 pipeline replacement project would be retroactive ratemaking.*

Number 11 should be modified as follows:

For test year 2004, the water system's ratebase should be *zero* \$502,611.

Proposed Conclusions of Law:

The below modifications to the Conclusions of Law are necessary to decide the ratemaking effects of the Application.

Number 5 should be modified as follows:

The 1997 distribution pipeline replacement project was *not* a reasonable and prudent decision. The net plant cost of this project should *not* be included in ratebase.

Number 6 should be deleted in its entirety.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of “**OPENING COMMENTS OF THE WATER DIVISION**” in **A.04-11-004** by using the following service:

☒ **E-Mail Service:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

☐ **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on July 5, 2006 at San Francisco, California.

/s/ PERRINE D. SALARIOS
Perrine D. Salariosa

N O T I C E

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